Supreme Court, U.S.
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No. 06-786

In the Supreme Court of the United States

AARON LOCKLEAR,

Petitioner,

v.

BERGMAN & BEVING AB; LUNA AB,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner, Aaron Locklear, respectfully requests the Court for rehearing of its denial of his petition for certiorari issued on February 20, 2007. The grounds for this petition that there are substantial grounds not presented in the petition and that there are substantial intervening circumstances of substantial effect which warrant rehearing.

ARGUMENT

1. Lower courts have recently acknowledged that there is a split among the circuits as to whether "lack of knowledge" is a mistake under Federal Rule of Civil Procedure 15(c)(3)(B).

In *Miller v. Holzmann*, 2006 U.S. Dist. LEXIS 93414 (D.D.C. Dec. 28, 2006), a case that was decided one month after the petition for a writ of certiorari was filed to this Court in this case, the District Court of the District of Columbia found that "lack of knowledge" was not a mistake under Fed. R. Civ. P. 15(c)(3)(B) (hereafter known as "Rule"), but noted in its opinion that the Third Circuit holds that "lack of knowledge" is a mistake under Rule 15(c)(3)(B). *Miller v. Holzmann*, 2006 U.S. Dist. LEXIS 93414, 27 (D.D.C. Dec. 28, 2006). *Miller*, decided one month after the petition for a writ of certiorari was filed to this Court in this case, represents important and substantial intervening circumstances that warrants rehearing in this case because *Miller* represents an ongoing conflict among the circuits as to whether "lack of knowledge" is a mistake under Rule 15(c)(3)(B), and clearly demonstrates that the split among the circuits will continue.

In *Arthur v. Maersk, Inc.*, the most recent case to come out of the Third Circuit Court of Appeals involving the "lack of knowledge" issue under Rule 15(c)(3)(B), the Third Circuit upheld its view that "lack of knowledge" was a mistake under Rule 15(c)(3)(B). *Arthur v. Maersk, Inc.*, 434 F. 3d 196 (3rd Cir. 2006). The Third Circuit adopted the view set forth in *Leonard v. Parry* in the First Circuit, that "lack of knowledge" was a mistake under Rule 15(c)(3)(B) because *Webster's Third New International Dictionary* 1146 (1981), defines mistake as "a wrong...statement proceeding from faulty judgment, inadequate knowledge, or inattention". *Id* at 208, see also *Leonard v. Parry*, 219 F. 3d 25, 27 (1st Cir. 2000). The court also noted that in *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 123, 110 S. Ct. 456, 107 L. Ed. 2d 438 (1989) that this Court held that the Federal Rules of Civil Procedure are given their plain meaning. *Id.* The court also notes the advisory committee's notes to the 1966 amendment of Rule 15, which state that "mistake" is not limited to a misnomer or misidentification. *Id.* The court also noted that *Leonard v. Parry*, 219 F. 3d 25, 27 (1st Cir. 2000) and *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F. 3d 1498, 1504 (9th Cir. 1994) also held that a "mistake" under Rule 15(c)(3)(B) is not limited to a misnomer or misidentification. *See id.* In the dissenting opinion of *Arthur*, Judge Van Antwerpen acknowledged that there was a split amongst the circuits as to whether "lack of knowledge" was a mistake under Rule 15(c)(3)(B). *See id* at 210-12.

2. When lower courts are split as to whether "lack of knowledge" is a mistake under rule 15(c)(3)(B), serious separation of powers issues arise that need to be resolved.

Rule 15(c)(3)(B) does not need to be changed, since some circuits have been able to properly interpret the Rule through proper analysis of the advisory committee's notes to the amendments to Rule 15. However, other circuits, including the Fourth Circuit, need to be corrected in their interpretation of Rule 15(c)(3)(B), because the primary purpose of the Federal Rules of Civil Procedure was to have rules that applied uniformly throughout federal courts. If lower courts continue to rule in opposite directions regarding a Federal Rule of Civil Procedure, it consequently renders the Federal Rules of Civil Procedure meaningless, since the lower courts would have carte blanche to apply the Federal Rules of Civil Procedure in any manner they desire. Such a split among the circuits in applying a Federal Rule of Civil Procedure raises serious separation of powers issues because the lower courts do not have the power to change or modify the Federal Rules of Civil Procedure. *See* 28 U.S.C. §§2071-2077. The Fourth Circuit, along with other circuits that hold that "lack of knowledge" of the proper defendant is not a mistake under Rule 15(c)(3)(B), have changed Rule 15(c)(3)(B) in their jurisdiction, something those courts are without power to do. *See id.*

3. The advisory committee has clearly intended that "lack of knowledge" is to be construed as a mistake under rule 15(c)(3)(B) in the 1966 amendment to rule 15.

In the advisory committee's note of the 1966 amendment to Rule 15, the committee noted that naming a non-existent federal agency or a retired officer are mistakes covered under Rule 15(c)(3) even though reasonable diligence will almost always prevent these mistakes from occurring. See *Lacedra v. Donald W. Hyatt Det. Facililty*, 334 F. Supp. 2d 114 (D.R.I. 2004) (citing the advisory committee's notes to the 1966 amendment of Rule 15). The advisory committee was clear that under Rule 15(c)(3), "lack of knowledge of the proper party" is to be construed as a mistake when they stated that suing a non-existent federal agency is a mistake, since the plaintiff would not know the identity of the proper party if the plaintiff was naming a non-existent defendant in its original complaint.

The notes of the advisory committee in the 1966 amendment to Rule 15 were also noted by this Court in *Schiavone v. Fortune*, where Justice Stevens and Justice White noted in their dissenting opinion:

> "The principal purpose of Rule 15(c) is enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way...Moreover, the specific liberalizing purpose of the 1966 amendment to the Rule is frustrated if the added language is construed to cut back on the number of cases in which relation back is permitted...A group of contrary cases in which plaintiffs had mistakenly sued the wrong Government

> official and not been allowed to amend their complaints after the statute had run give rise to criticism of the Rule and the addition of the second and third sentences of its present text. Ironically, it is the language added by the amendment in 1966 to broaden the category of harmless pleading errors which the Court construes today to narrow that category. "

Schiavone v. Fortune, 477 U.S. 21, 38-39 (1986) (Justice Stevens and Justice White dissenting).

Although *Schiavone* did not address "lack of knowledge" as a mistake, and rather dealt with the issue of notice under Rule 15(c), it is clear that this Court has recognized that the advisory committee's notes to the 1966 amendment of Rule 15 are to be liberalizing to plaintiffs who seek to correct pleading errors and that the purpose was not to cut back on the number of cases where relation back is permitted.

4. The advisory committee's notes to the 1991 amendment of rule 15 merely give examples of mistake under rule 15(c)(3)(B), and do not limit the types of mistake under rule 15(c)(3)(B).

The Fourth Circuit and other circuits that join in its view that "lack of knowledge" is not a mistake under Rule 15(c)(3)(B), have failed to carefully read the advisory committee's notes to the 1991 Amendment of Rule 15 and the advisory committee's notes to the 1966 Amendment of Rule 15. The Fourth Circuit in this case states that a mistake falls under Rule 15(c)(3) where it is to "correct a formal defect such as a misnomer or misidentification". *See Locklear v.*

Bergman & Beving, AB, 457 F. 3d 363, 366 (4th Cir. 2006). This phrase is a direct quote of the advisory committee's notes to the 1991 Amendment to Rule 15. *See* Fed. R. Civ. P. 15 (advisory committee's notes to the 1991 Amendment).

The error that the Fourth Circuit made in this case was that the language of the advisory committee's notes lists mistakes "such as" a misnomer or misidentification. The term "such as" does not limit what is to be construed as a mistake under Rule 15(c)(3), but rather gives examples of mistakes under the Rule. The Federal Rules of Civil Procedure are carefully drafted, and the language of Rule 15(c)(3) clearly does not limit the types of mistake. The advisory committee's notes to the 1966 Amendment to Rule 15 clearly state that naming a non-existent defendant in the original complaint is a mistake under Rule 15(c)(3). *See* Fed. R. Civ. P. 15 (advisory committee's notes to the 1966 amendment). Although the advisory committee's notes state that a mistake "includes" a misnomer or misidentification, it does not state that a mistake is limited to such scenarios. *Id.*

There have not been any changes to Rule 15, nor have their been any notes by the advisory committee following the 1966 Amendment to Rule 15 that change this assertion made by the advisory committee in its notes to the 1966 Amendment to Rule 15. It is also clear that when a plaintiff names a non-existent defendant in the original complaint, such as the Petitioner and Plaintiff, Aaron Locklear, did in this case by naming "Hasselholms Mekansika, AB" (a non-existent corporation whose successor is Berman & Beving, AB) in his original complaint as the defendant, that the plaintiff lacks the knowledge of the identity of the proper party to be named in the complaint as the defendant, and thus

lack of knowledge is a mistake under Rule 15(c)(3)(B). Since it is clear that "lack of knowledge" is a mistake under Rule 15(c)(3)(B), and that several, but not all circuits, including the Fourth Circuit in this case, have continued for a number of years to incorrectly apply Rule 15(c)(3)(B) and have instead change the Rule in their jurisdiction, this Court must resolve this issue and put an end to the erroneous application of Rule 15(c)(3)(B) by several, but not all circuits.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests the Court to grant the petition for rehearing.

Respectfully submitted,

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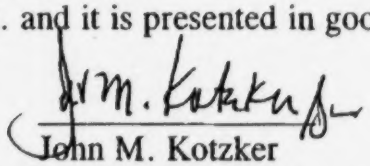
CERTIFICATION

The foregoing is restricted to the grounds specified in 44.2 S. Ct. R. and it is presented in good faith and not for delay.



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